

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
at CHATTANOOGA

UNITED STATES OF AMERICA )  
                                )  
                                )  
                                ) No. 1:04-CR-138  
v.                             )  
                                )  
                                ) Chief Judge Curtis L. Collier  
                                )  
JOSEPH SWAFFORD and      )  
JES, INC. d/b/a BROADWAY HOME    )  
AND GARDEN CENTER         )

**O R D E R**

Before the Court is Defendant Joseph Swafford's ("Defendant") Amended Motion to Strike or Elect Counts of Multiplicity (Court File No. 108) with supporting memorandum (Court File No. 109). These documents clarify and elaborate upon Defendant's previous filings (Court File Nos. 99, 100). The motion requests the Court to force the government to elect to prosecute certain counts before trial (Court File No. 108). The government has not filed a response<sup>1</sup>.

The Court has examined the challenged counts and considered Defendant's argument<sup>2</sup>. After considering the counts, the Court is not convinced the counts are in fact multiplicitous. There are elements in one class of the counts that are not found in the other class of counts. Obviously, there

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<sup>1</sup>It does a disservice to the Court and also to the administration of justice for a party to fail to respond to a motion. That is especially true in criminal cases. Even a short response informs the Court of the parties' position and serves as helpful guidance. Moreover, failure to fail a response could reasonably be understood as agreement with the position taken in the motion.

<sup>2</sup>On Thursday, February 9, 2006, at the Final Pretrial Conference held in this case this motion was raised. The Court informed the parties it was familiar with the motion but thought a decision had been issued. When informed by the parties that a decision had not been rendered, the Court summarized the reasoning in this order and indicated a decision would be issued soon.

is some overlap. However, the Court is of the view that rather than precluding the Government from offering proof on the counts at trial, it would be more appropriate to restrict the jury consideration of certain counts, or, if the jury returns, guilty verdict on all counts, then withhold sentencing on certain courts. This will further the Government's interest and also protect Defendant from multiple punishment for the same acts. Of course, this will apply only if the Court concludes the two classes are counts run afoul of the rules against multiplicitous pleadings. Therefore, the Court **DENIES** Defendant's motion (Court File No. 108).

**SO ORDERED.**

**ENTER:**

/s/  
**CURTIS L. COLLIER**  
**CHIEF UNITED STATES DISTRICT JUDGE**